

# **Communications law – what every competition lawyer should know...**

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# Competition law and sector-specific communications regulation

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- Sectoral rules and competition law draw on common principles
- Scope for:
  - Direct interaction:
    - ◆ *Trinko* (US Sup. Ct. – 2004)
    - ◆ *Deutsche Telekom* (EU Gen. Ct. – 2008)
    - ◆ *H3G I* (CAT – 2005)
  - Common issues & cross fertilisation (substantive and procedural)

# Specific focus

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- UK experience
- Communications Act 2003
- Recent and forthcoming cases before CAT / High Court / Court of Appeal
- Aim to identify:
  - Substance – relationship to competition law
  - Procedural framework
  - Some issues of general interest to competition practitioners

# Part 1: the substance

Communications  
law:  
Like competition  
law...  
only less interesting

## Broadly based on competition principles, but applied *ex ante*

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- Framework of analysis similar to Art.102:
  - Market definition
  - Assessment of market power (dominance)
  - BUT – no need to show abusive conduct
    - ◆ Sufficient to consider whether there is potential for competition problems to arise
    - ◆ If so, remedy is imposed *ex ante*

# Remedies may go beyond the (usual) limits of *ex post* competition law

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- Regulating price
  - Art.102 rarely applied to control excessive pricing
    - ◆ Courts / comp authorities ill-suited to ongoing regulation
    - ◆ Regulating prices may discourage competitive entry
  - Legal certainty concerns only applicable *ex post*
    - ◆ Limits choice of cost measures to dominant firm's own costs – Deutsche Telekom
    - ◆ Cf. *ex ante* controls, which may allow a wider range of reference points
  - Cf. communications context:
    - ◆ Natural monopoly / stubborn bottlenecks require enduring regulation
    - ◆ Sectoral regulator established to regulate price where necessary

# Comms Act: telecoms

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- Implements common regulatory framework (EU legislation)
- SMP conditions:
  - Define relevant markets in the telecoms field
  - Determine whether any comms providers have significant market power (SMP)
  - Impose regulatory obligations
  - Obligations may include price controls provided that:
    - ◆ There is a relevant risk of adverse effects arising from a price distortion (margin squeeze or "*prices at an excessively high level*")
    - ◆ It appears to Ofcom that they are appropriate for the purposes of: (i) promoting efficiency; (ii) promoting sustainable competition; (iii) conferring greatest poss. benefits on end users

# Comms Act: telecoms

## Example of local loop

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- Regulating the last mile of fixed telecoms network
- Market definition: product – substitutes: cable? Mobile? Geographic – national or local?
- Dominance: BT = sole provider of fixed telecoms network to most residential premises
- Remedies: price controls of many 'local loop' products (MPF, SMPF, WLR)

# Comms Act: telecoms

## e.g. of mobile call termination

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- Wholesale service required to connect a call to a mobile network
- Market definition: each mobile network has exclusive ability to connect calls to its own networks; do substitute means of communication at the retail level act as competitive constraints?
- Dominance: In EU, the calling party pays; mobile networks therefore do not compete to offer reduced termination rates;
- Remedies: price control imposed on each mobile network operator

# Comms Act: Broadcasting

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- Section 316

- Ofcom to insert such conditions in broadcasting licences as it considers appropriate for ensuring fair and effective competition

## Section 317

- Ofcom must first consider whether a more appropriate way of proceeding would be under CA98

# Comms Act: broadcasting

## E.g.: Pay TV consultation

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- Ofcom has used s.316 to impose a wholesale must offer obligation on Sky
- Would apply to core premium sports content
- Market definition: separate wholesale and retail markets defined for this content
- Ofcom suggests that Sky has market power
- Remedy: Ofcom finds strategic incentives in play to restrict supply; and requires supply on terms sufficient to enable a reasonably efficient operator, on smaller scale, to operate profitably in the retail market

# Part 2: procedural framework

An adventure  
playground for  
lawyers

# Comms Act: Telecoms

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- Appeal against a decision by Ofcom to impose SMP conditions is to Competition Appeal Tribunal – s.192
- Appeal is ‘on the merits’
- If appeal raises ‘price control matters’ (i.e. grounds relating to level or method of price controls), CAT must refer them to CC
- CC determines reference
- CAT must then dispose of the appeal in accordance with CC’s determination unless it decides that the determination falls to be set aside on judicial review principles!

# Comms Act: telecoms

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- A four stage process (Ofcom, CAT, CC, CAT)
- Great potential for delay – CAT rules specify 4 months as default period for a reference
- In practice, CC typically needs much longer
- Major appeals to date: MCT, LLU (ongoing), leased lines (ongoing)

# Comms Act: telecoms

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- Can CC only amend price control in the direction proposed by the appellant?
  - ◆ CAT required to decide the appeal 'by reference to the grounds of appeal set out in the Notice of Appeal'
  - ◆ BUT, if this is correct:
    - great incentive to appeal: one way bet
    - Everyone will appeal to ensure all points are before CC

# Comms Act: telecoms

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- What remedies are available to the appellant if the appeal succeeds and the price control was fixed at the wrong level?
  - MCT
    - ◆ Can CAT order replacement price control for elapsed periods? – Issue awaiting judgment from Court of appeal
    - ◆ Can CC adjust price control for unelapsed period to correct for over- or underpayments in elapsed periods?

# Comms Act: broadcasting

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- Two different jurisdictions
  - CAT has jurisdiction to hear appeals against a decision under s.316 to impose a condition to ensure fair and effective competition
  - A decision under s.317 that it would not be more appropriate to proceed under CA98 is challengeable by way of judicial review in the High Court
  - Five appeals currently pending under s.317; no judicial reviews yet

# Part 3: Issues raised in the case-law

# (1) Dominance / SMP – the greenfield approach

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- Should Ofcom take account of other regulation when deciding whether there is SMP?
- Other regulation might be sufficient to constrain market power – e.g. Competition law, dispute resolution (SMP conditions = longstop)
- H3G I(2005)
  - Ofcom right to disregard ex post competition law: risk of circularity - risk of SMP means no dominance; risk of dominance means no SMP
  - BUT Ofcom should have considered impact of dispute resolution on countervailing buyer power
- H3G II (2008)
  - Dispute resolution also to be disregarded when assessing SMP
  - Upheld on appeal to Court of Appeal
- How should *ex post* competition law analysis approach other regulation?

## (2) Margin squeeze – *ex ante* *v. ex post*

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- Deutsche Telekom: focus on 'as efficient' competitor
- In pay TV statement, Ofcom uses Sky's costs but adjusts for scale – market couldn't accommodate two companies on Sky's scale
  - No legal certainty concerns (cf. DT)
  - In DT, Gen. Ct. approved one permissible mode of margin squeeze analysis in the circumstances of that case
  - Pay TV appeals involve a slightly modified test in a difference, and *ex ante*, context

## (3) Excessive pricing – *ex ante v. ex post*

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- H3G II (Court of Appeal)
- Had Ofcom met the high standard for excessive pricing required under *ex post* competition law?
- Jacob LJ: “it seems to me that article 13 does not suggest that it will necessarily be unusual or exceptional that price controls are imposed”
- Suggests lower threshold for *ex ante* intervention

## (4) Standard of review

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- What is meant by “merits” appeal?
- O2 v. Ofcom [2009], CA – Jacob LJ:  
“After all it is inconceivable that Art. 4, in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision”
- Differences between standard applicable in context of *ex post* competition law and *ex ante* regulatory decision making?

## (5) Procedure

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- *Ex post* regime – a clear and efficient structure
- *Ex ante* regime:
  - excessively complex, time-consuming and expensive
  - Incentive for all parties to appeal on every point
  - CC becomes risks becoming a duplicate regulator waiting in the wings

## (6) Remedy

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- *Ex post* regime: follow on damages available
- Should similar compensation arrangements be in place for *ex ante* regime?
  - Time-limited price control
  - Appeals time consuming
  - Risk that appeal will serve no useful purpose?
  - Adjustment for unelapsed period?
  - Dispute resolution?

# Thank You

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